

June 2, 1993

Mr. Yukio Naito
Chairperson
Public Utilities Commission
Kekuanaoa Building
465 S. King Street
Honolulu, Hawaii 96813

Attention: Mr. Henry T. Tsuyemura
Administrative Director

Dear Chairperson Naito:

Re: Financial Reports Submitted to the PUC by Public Utilities
and Motor Carriers

This is in reply to a letter dated March 25, 1992 from Mr. Henry T. Tsuyemura to Attorney General Robert A. Marks requesting an advisory opinion concerning the above-referenced matter. In accordance with departmental protocol, Mr. Tsuyemura's letter was forwarded to the Office of Information Practices ("OIP") for a reply.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act Modified, chapter 92F, Hawaii Revised Statutes ("UIPA"), the Public Utilities Commission ("PUC") must make monthly and annual financial reports filed with the PUC by public utilities and motor carriers available for public inspection and duplication upon request.

BRIEF ANSWER

Except as provided in section 92F-13, Hawaii Revised Statutes, under the UIPA, all government records must be made available for inspection and copying "upon request by any person." Haw. Rev. Stat. 92F-11(b) (Supp. 1992). Additionally, however, under section 92F-12(b)(2), Hawaii Revised Statutes, each agency must disclose "[g]overnment records which,

pursuant to federal law or a statute of this State, are expressly authorized to be disclosed to the person requesting access." Included within the scope of this UIPA section are records that are described as "public records" by State statutes other than the UIPA.

Section 271-11, Hawaii Revised Statutes, provides that "the statistics, tables, and figures contained in the annual or other reports of carriers made to the [PUC] required under this chapter shall be preserved as public records in the custody of the [PUC]." Accordingly, we conclude that "[a]ny provision to the contrary notwithstanding," under sections 92F-12(b)(2) and 271-11, Hawaii Revised Statutes, financial reports filed with the PUC by motor carriers must be made available for inspection and duplication during the PUC's regular business hours.

Additionally, while annual and monthly reports filed by regulated public utilities under chapter 269, Hawaii Revised Statutes, contain commercial and financial information, the OIP is informed that the PUC has had a long standing practice of making the financial information described in these reports available for public inspection and copying, and that the PUC's policy in this regard pre-dates the effective date of the UIPA.

Because the Legislature did not intend the UIPA's exceptions to be used by agencies to restrict access to government records that were "public" before the adoption of the UIPA even though they might fit within one of the exceptions in section 92F-13, Hawaii Revised Statutes, we conclude that under the UIPA, monthly and annual financial reports filed with the PUC by regulated public utilities should also be made available for public inspection and copying upon request.

FACTS

Under chapter 271, Hawaii Revised Statutes, the activities of "motor carriers" are regulated by the PUC. Subject to numerous exemptions, the term "motor carrier" means "any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property." Haw. Rev. Stat. 271-4 (1985).

Section 271-36, Hawaii Revised Statutes, provides that motor carriers must pay to the PUC an annual fee that is equal to one-eighth of one percent of the motor carrier's gross revenues.

To assist the PUC in performing its regulatory duties, and to assist the PUC in confirming the amount of the annual fee owed by

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each motor carrier, the PUC requires each motor carrier to file an annual report with PUC. Under section 271-25, Hawaii Revised Statutes, the PUC is authorized to compel motor carriers to file annual, periodical, or special reports with the PUC. A copy of the annual report that must be filed with the PUC by Class "A" common property carriers with PUC regulated revenues exceeding \$200,000 is attached as Exhibit "A."

Under chapter 269, Hawaii Revised Statutes, the activities of "public utilities" are also regulated by the PUC. Subject to numerous exemptions and exclusions, the definition of the term "public utility" means:

[E]very person who may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, . . . any plant or equipment, or any part thereof, directly or indirectly for public use, for the transportation of passengers or freight, or the conveyance or transmission of telecommunication messages, or the furnishing of facilities for the transmission of intelligence by electricity by land or water or air within the State . . . or for the production, conveyance, transmission, delivery, or furnishing of light, power, heat, cold, water, gas, or oil, or for the storage or warehousing of goods, or the disposal of sewage.

Haw. Rev. Stat. 269-1 (1985 & Supp. 1992).

Each public utility must pay to the PUC a fee equal to one-quarter of one percent of the gross income from public utility business. Haw. Rev. Stat. 269-30 (1985). In order to monitor the manner in which each public utility is operated, to verify historical data used by public utilities to justify a request for a rate increase, and to verify the correct fee owed to the PUC, the PUC requires public utilities to file monthly and annual financial reports on prescribed forms. Under section 269-8, Hawaii Revised Statutes, all public utilities must furnish the PUC with all information the PUC might require concerning matters it is authorized to investigate.

In his letter to Attorney General Robert A. Marks requesting an advisory opinion, Mr. Henry Tsuyemura stated:

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The [PUC] maintains that these are public records and allows other government agencies, such as the state tax office and the internal revenue service, access to these records. Some utilities consider certain information provided on the forms and in annual reports as proprietary information and, therefore, confidential. As such, the [PUC] requests an opinion on this issue.

Letter from Henry Tsuyemura to Attorney General Robert A. Marks at 2 (March 25, 1993).

By letter to the PUC dated April 6, 1993, the OIP sought a clarification from the PUC concerning its past policies concerning the public disclosure of financial reports submitted by motor carriers and public utilities to the PUC. In a letter to the OIP dated April 16, 1993, the PUC clarified that:

It has been the past practice of the commission to make the financial information described in our request available for public inspection and copying upon request. This practice pre-dates the effective date of the UIPA, July 1, 1989.

Letter from Henry Tsuyemura to OIP Staff Attorney Hugh R. Jones at 1 (April 16, 1993).

DISCUSSION

I. INTRODUCTION

The UIPA provides that all government records shall be made available for public inspection and duplication, unless access to those records is closed or restricted by law. Haw. Rev. Stat.

92F-11(a) (Supp. 1992). More specifically, the UIPA states, "[e]xcept as provided by section 92F-13, each agency upon request by any person shall make government records available for inspection and copying." Haw. Rev. Stat. 92F-11(b) (Supp. 1992).

Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat.

92F-3 (Supp. 1992). Because the PUC is an "agency" for

purposes of the UIPA,¹ and because the financial reports filed by public utilities and motor carriers constitute "information maintained by an agency in written . . . or other physical form," we conclude that such reports are "government records." Therefore, we conclude that the public's right to inspect and copy these financial reports is governed by the provisions of the UIPA.²

II. RECORDS THAT ARE PUBLIC ANY PROVISION TO THE CONTRARY
NOTWITHSTANDING: MOTOR CARRIERS' FINANCIAL REPORTS

Before turning to an examination of whether any of the exceptions in section 92F-13, Hawaii Revised Statutes, permits the PUC to withhold access to annual financial reports filed by public utilities and motor carriers, we must first determine whether these reports must be made available for public inspection and copying under section 92F-12, Hawaii Revised Statutes, "[a]ny provision to the contrary notwithstanding."³

Section 92F-12(b)(2), Hawaii Revised Statutes, provides that each agency must make available for public inspection and copying

¹See section 92F-3, Hawaii Revised Statutes, "agency" means "any unit of government in this State, any county, or any combination of counties; department; institution; board; commission; district; council; bureau; office; governing authority . . . but does not include the nonadministrative functions of the courts of this State." [Emphasis added.]

²See also AT&T Communications of West Virginia v. Public Service Commission of West Virginia, 423 S.E.2d 859 (W.Va. 1992) (as an administrative agency, public disclosure of information possessed by West Virginia Public Service Commission governed by West Virginia Freedom of Information Act).

³In section 92F-12, Hawaii Revised Statutes, the Legislature set forth a list of government records or information contained therein that must be made available for public inspection and copying during regular business hours. The UIPA's legislative history clarifies that "[a]s to these records, the [UIPA's] exceptions for personal privacy and for frustration of legitimate government function are inapplicable . . . [t]his list merely addresses some particular cases by unambiguously requiring disclosure." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988).

"[g]overnment records which, pursuant to federal law or a statute of this State, are expressly authorized to be disclosed to the person requesting access." Included within the scope of this UIPA section are records that are described as "public records" in State statutes other than the UIPA.⁴

Accordingly, it is necessary for the OIP to examine and apply the provisions of section 271-11, Hawaii Revised Statutes, which provides:

271-11 Copies of schedules, tariffs, contracts, etc., kept as public records; evidence. The copies of schedules and classifications and tariffs of rates, fares, and charges, and all contracts, agreements, and arrangements between motor carriers filed with the public utilities commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the commission as required under this chapter shall be preserved as public records in the custody of the commission (except any contract, agreement, or arrangement between a contract carrier by motor vehicle and a shipper shall only be made public as provided in section 271-25) and shall be received as prima facie evidence of what they purport to be for the purposes of investigations by the commission and all judicial proceedings; and copies and extracts from any of the schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the commission under the commission's seal, shall be received in evidence with like effect as the originals.

⁴The commentary to the parallel provision of the Uniform Information Practice Code ("Model Code") drafted by the National Conference of Commissioners on Uniform State Laws, upon which the UIPA was modeled by the Legislature, states that it "provides that information cannot be withheld if its disclosure is pursuant to a federal law or state statute." Model Code § 3-101(a)(5) commentary at 21 (1981).

Haw. Rev. Stat. 271-11 (1985) (emphases added).

The legislative history of chapter 271, Hawaii Revised Statutes, states that the above-quoted provision was intended to "provide[] that schedules, tariffs, contracts, etc., filed with the commission and other records of the commission shall be public records except as to an agreement between a contract carrier and a shipper, unless said contract is in violation of this chapter." S. Stand. Comm. Rep. No. 981, 1st Leg., 1961 Reg. Sess., Haw. S.J. 1000, 1001 (1961).

Based upon the clearly expressed provisions of section 271-11, Hawaii Revised Statutes, it is our opinion that "[a]ny provision to the contrary notwithstanding" under section 92F-12(b)(2), Hawaii Revised Statutes, annual financial reports filed with the PUC by motor carriers under chapter 271, Hawaii Revised Statutes, must be made available for public inspection, upon request, during the PUC's regular business hours.⁵

Because our research does not disclose any provision of chapter 269, Hawaii Revised Statutes, that expressly requires the public availability of financial reports submitted to the PUC by public utilities, we now turn to a consideration of whether such reports are protected by any of the UIPA's exceptions in section 92F-13, Hawaii Revised Statutes.

III. FINANCIAL REPORTS OF PUBLIC UTILITIES UNDER CHAPTER 269, HAWAII REVISED STATUTES

Unlike chapter 271, Hawaii Revised Statutes, chapter 269, Hawaii Revised Statutes, does not contain an express provision which requires the public availability of monthly and annual financial reports filed with the PUC by regulated utilities. Thus, we must determine whether any of the exceptions in section 92F-13, Hawaii Revised Statutes, would authorize the PUC to withhold access to these financial reports.

⁵In N.Y. Telephone v. Public Service Com'n, etc., 451 N.Y.S.2d 679 (Ct. App. N.Y. 1982), the court held that a New York statute that provided that all proceedings and records of the New York Public Service Commission shall be public did not foreclose the commission from restricting access to its proceedings when necessary to protect confidential trade information. In light of the unambiguous provisions of section 92F-12(b)(2), Hawaii Revised Statutes, we do not find the court's reasoning in that case persuasive given the facts present in this case.

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Under section 92F-13(3), Hawaii Revised Statutes, an agency is not required by the UIPA to disclose "[g]overnment records which must remain confidential in order to avoid the frustration of a legitimate government function." In Senate Standing Committee Report No. 2580, dated March 31, 1988, the Legislature provided examples of records that may be withheld under this exception:

(b) Frustration of legitimate government function. The following are examples of records which need not be disclosed, if doing so would result in the frustration of a legitimate government function.

. . . .

(7) Trade secrets or confidential commercial and financial information;

S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

In OIP Opinion Letter No. 90-3 (Jan. 18, 1990), we found that revenue audit reports concerning concessionaires at State airports did not include "confidential" commercial and financial information. Attached to that opinion letter were sample financial reports that were found to be protected under Exemption 4 of the federal Freedom of Information Act, 5 U.S.C. 552(b)(4) (1988) ("FOIA")⁶ in the case of National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 672 (D.C. Cir. 1976) ("National Parks II").

While portions of the monthly and annual financial reports submitted by public utilities contain information that is very similar to that found to be protected by the court in National Parks II, the OIP is persuaded in this case that protection of such financial reports under section 92F-13(3), Hawaii Revised Statutes, would be contrary to the Legislature's intent. Specifically, in its report, the conference committee assigned to work out differences between the House and Senate versions of the

⁶FOIA's Exemption 4 allows federal agencies to withhold "commercial and financial information" which is "confidential."

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bill which led to the adoption of the UIPA (H.B. No. 2002), provided:

5. Exceptions to Access. The bill will provide in section -13 a clear structure for viewing the exceptions to the general rule of access. The five categories of exceptions relate to personal privacy, frustration of government practice, matters in litigation, records subject to other laws and an exemption relating to the Legislature. The category relating to personal privacy is essentially the same in both the House Draft and the Senate Draft. The second category, concerning frustration of legitimate government functions, was clarified by examples on pages 4 and 5 of Senate Standing Committee Report No. 2580. The last three are self-explanatory.

The records which will not be required to be disclosed under section -13 are records which are currently unavailable. In is not the intent of the Legislature that this section be used to close currently available records, even though these records might fit within one of the categories in this section.

S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. R. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988) (emphasis added).

The Hawaii Supreme Court has declared that "[w]hen construing the meaning of a statute, our foremost obligation `is to ascertain and give effect to the intention of the legislature.'" In re Hawaiian Telephone Co., 61 Haw. 572, 577 (1980); Kaapu v. Aloha Tower Dev. Corp., ____ Haw. ____, No. 15775 (Feb. 25, 1993). If the statutory language is ambiguous, or if doubt exists as to its meaning, "[c]ourts may take legislative history into consideration in construing a statute." Life of the Land v. City and County of Honolulu, 61 Haw. 390, 447 (1980).

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Based upon the PUC's written representation to the OIP that "[i]t has been the past practice of the commission to make the financial information described in our request available for public inspection and copying upon request," and because this PUC practice pre-dated the adoption of the UIPA, it is our opinion that non-disclosure of monthly or annual financial reports filed with the PUC by regulated utilities under section 92F-13(3), Hawaii Revised Statutes, would be contrary to the expressed legislative intent behind section 92F-13, Hawaii Revised Statutes.

Accordingly, it is our opinion that in accordance with section 92F-11(b), Hawaii Revised Statutes, monthly and annual financial reports filed with the PUC by regulated utilities must be made available for inspection and copying "upon request by any person."

CONCLUSION

Under section 92F-12(b)(2), Hawaii Revised Statutes, each agency must disclose government records which pursuant to State or federal law, are authorized to be disclosed to the person requesting access. Section 271-11, Hawaii Revised Statutes, provides that "the statistics, tables, and figures contained in the annual or other reports of [motor] carriers made to the commission as required under this chapter shall be preserved as public records in the custody of the commission." As such, we conclude that financial reports filed with the PUC by motor carriers under chapter 271, Hawaii Revised Statutes, must be made available for public inspection and copying "notwithstanding any provision to the contrary."

With regard to monthly and annual financial reports filed with the PUC by regulated utilities under chapter 269, Hawaii Revised Statutes, it is our opinion that such reports are not protected from public disclosure by any of the UIPA's exceptions in section 92F-13, Hawaii Revised Statutes.

In adopting the UIPA, it was not the Legislature's intention that the UIPA's exceptions restrict access to records that were public before the adoption of the UIPA, even though such records might fit within one of the exceptions. Because the PUC made financial reports by regulated utilities available for public inspection and duplication before the effective date of the UIPA, July 1, 1989, it is our opinion that such reports are also government records that are "public" under the UIPA.

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Please contact me at 586-1404 if you should have any questions concerning this opinion letter.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:sc
Attachment
c: Rod Kimura
Deputy Attorney General